MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE

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IN THE
COURT OF APPEALS OF INDIANA

Kevin L. Martin,
Appellant,

v.

John Galipeau, et al.,
Appellees.

January 27, 2021

Court of Appeals Case No. 20A-CT-1178

Appeal from the LaPorte Circuit Court

The Honorable Thomas J. Alevizos, Judge

Trial Court Cause No. 46C01-2001-CT-108

Brown, Judge.

[1] Kevin L. Martin appeals the trial court's dismissal of his complaint. We affirm.

Facts and Procedural History

[2] Martin is incarcerated in the Indiana Department of Correction. On January 8, 2020, Martin filed a complaint against John Galipeau, Marisha White, Kenneth Gann, Lieutenant Armstrong, Lieutenant Herr, Gary Lewis, and Officer Martin (collectively, "Defendants") which alleged that female officers monitored the shower area by camera and he was denied his expectation of privacy. His complaint cited the Fourth and Eighth Amendments to the United States Constitution and Article I of the Indiana Constitution.

[3] On April 17, 2020, Defendants filed a motion to dismiss under Ind. Trial Rule 12(B)(6). On April 30, 2020, the trial court issued an order granting Defendants' motion to dismiss.[1]

[1] Martin has filed several cases which have been dismissed. *See Martin v. Hunt*, 130 N.E.3d 135, 137-138 (Ind. Ct. App. 2019) (affirming dismissal of complaint and collecting cases initiated by Martin) (citing *Martin v. Gilbert, et. al.*, No. 18A-CT-2095 (Ind. Ct. App. June 5, 2019) (dismissed action as frivolous), *trans. denied*; *Martin v. Brown, et. al.*, No. 18A-CT-2940 (Ind. Ct. App. March 15, 2019) (affirmed dismissal on violations of rules of appellate procedure), *trans. denied*; *Martin v. Howe, et. al.*, No. 18A-CT-680 (Ind. Ct. App. November 14, 2018) (dismissal of appeal and noting failure to make cogent argument), *trans. denied*; *Martin v. Kawecki, et. al*, 71C01-1711-CT-000508 (May 17, 2018) (trial court dismissed complaint for failure to state a claim upon which relief could be granted); *Martin v. Sanford, et. al.*, 71C01-1711-CT-000523 (December 18, 2017) (trial court dismissed action for failure to state a claim upon which relief could be granted)).

Discussion

[4] Martin is proceeding *pro se*. It is well settled that *pro se* litigants are held to the same standards as licensed attorneys and are required to follow procedural rules. *Martin v. Hunt*, 130 N.E.3d 135, 136-137 (Ind. Ct. App. 2019) (citing *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*).

[5] Martin claims the trial court erred in granting the motion to dismiss without a hearing and cites the Fourth and Eighth Amendments. He also asserts the trial judge should have recused.

[6] To the extent Martin does not present cogent argument, the issues or assertions he attempts to present are waived. *See id*. at 137-138 (finding Martin did not provide cogent argument or cite relevant precedent which resulted in waiver of the issues he attempted to present and affirming the dismissal of his complaint).

[7] A motion to dismiss pursuant to Ind. Trial Rule 12(B)(6) tests the legal sufficiency of the complaint. *Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 173 (Ind. 2017). The rule requires that we accept as true the facts alleged in the complaint. *Id.* We review 12(B)(6) motions de novo. *Id.* We will affirm a dismissal if the decision is sustainable on any basis in the record. *Id.*

[8] We note that the trial court was not required to hold a hearing on Defendants' Trial Rule 12(B)(6) motion. *See Saylor v. State*, 81 N.E.3d 228, 231 (Ind. Ct. App. 2017) (noting "[t]here is no requirement in the [12(B)(6)] rule requiring the court to conduct a hearing or oral argument upon, or to receive a response to[,] a motion to dismiss when the motion is addressed to the face of the

complaint") (quoting *Cobb v. Owens*, 492 N.E.2d 19, 20 (Ind. 1986)), *trans. denied*.

[9] In *Johnson v. Phelan*, the plaintiff's complaint raised a Fourth Amendment challenge to female officers routinely and incidentally observing male prisoners in various states of undress in their prison cells, showers, and toilets. *Henry v. Hulett*, 969 F.3d 769, 783 (7th Cir. 2020) (citing *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir. 1995)). The district court dismissed the complaint for failure to state a claim on which relief may be granted. *Johnson*, 69 F.3d at 145. The Seventh Circuit affirmed the dismissal of the inmate's Fourth Amendment claim. *Henry*, 969 F.3d at 782 (citing *Johnson*, 69 F.3d at 150). The Court also stated that, "[a]fter incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment," the Eighth Amendment "has a demanding mental-state component," and "[c]ross-sex monitoring is not a senseless imposition" and "cannot be called 'inhumane.'" *Johnson*, 69 F.3d at 147-151 (citations omitted). The Court concluded the complaint failed to state a claim upon which relief may be granted. *Id*. at 151.

[10] In *Henry*, the Seventh Circuit held the Fourth Amendment protects a right to bodily privacy for convicted prisoners, albeit in a significantly limited way, including during visual inspections. *Henry*, 969 F.3d at 774. In that case, female inmates were subjected to mass strip searches as part of a cadet training exercise. *Id*. Correctional officers and cadets lined up 200 inmates in rows, forced them to stand facing a wall, screamed obscenities at them, and called them sexually derogatory names. *Id*. Officers ordered cadets to perform strip

searches on groups of four to ten inmates at a time, inmates were required to stand until cadets strip searched them and in some cases waited five to seven hours, and the inmates could not sit or use the restroom for the duration of the training exercise. *Id*. The strip searches occurred in areas allowing many people who were not performing the strip searches to observe the female inmates, the inmates were forced to remove all of their clothing and stand in a line nearly shoulder to shoulder, the officers and cadets ordered the inmates to raise their breasts, lift their hair, turn around and bend over, spread their buttocks and vaginas, and cough several times, inmates were forced to stand naked for as long as fifteen minutes, the officers and cadets ordered menstruating prisoners to remove feminine products and dispose of them in full view of others, and inmates stood barefoot on the bathroom floor which was dirty with menstrual blood and other bodily fluids. *Id*. at 774-775.

[11] The plaintiff inmates alleged their Fourth and Eighth Amendment rights were violated. *Id*. at 774. The district court granted summary judgment for the defendants on the plaintiffs' Fourth Amendment claim and reasoned that the strip searches were limited to visual inspections of the naked body, putting them in line with *Johnson* which foreclosed the inmates' Fourth Amendment claim. *Id*. at 775-776.

[12] The Seventh Circuit, *en banc*, reviewed case law related to the protections afforded incarcerated persons under the Fourth Amendment, noted strip searches are demeaning, dehumanizing, and humiliating, and stated the privacy

interest in one's body is clearly a heightened and fundamental one. *Id*. at 776-778. The Court held:

> We conclude that a diminished right to privacy in one's body, unlike a right to privacy in one's property and surroundings, is not fundamentally incompatible with imprisonment and is an expectation of privacy that society would recognize as reasonable. We therefore join every other circuit to have addressed the question and hold that the Fourth Amendment protects (in a severely limited way) an inmate's right to bodily privacy during visual inspections, subject to reasonable intrusions that the realities of incarceration often demand. . . . Thus, when evaluating a prisoner's Fourth Amendment claim regarding a strip or body cavity search, courts must assess that search for its reasonableness, considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Id. at 779 (citation omitted). The Court further held:

> [W]e overrule our decision in *Johnson* to the extent it deems the Fourth Amendment inapplicable to visual inspections during bodily searches. That case, like the one we address today, involved visual bodily searches, although of a less intrusive manner: male prisoners raised a Fourth Amendment challenge to female officers routinely and incidentally observing them in various states of undress in their prison cells, showers, and toilets. *Johnson*, 69 F.3d at 145. In *Johnson*, we read *Hudson* [*v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984),[2]] as eliminating all rights to privacy under the Fourth

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[2] In *Henry*, the Court stated:

> [I]n *Hudson*, the Court announced a limited categorical rule: the "Fourth Amendment proscription against unreasonable searches does not apply within the confines of the *prison cell*." 468 U.S. at 526, 104 S. Ct. 3194 (emphasis added). Importantly, *Hudson* left open the

> Amendment within prisons and thus affirmed the dismissal of the plaintiff's Fourth Amendment claim on that basis. *Id*. at 146, 150. That reasoning does not survive today's holding. We do note, however, that the result in *Johnson* would have been no different under a reasonableness analysis, given the limited nature of the intrusions at issue and the ever-present institutional concerns over safety and security.

Id. at 783.

[13] Martin's complaint alleged that female officials monitored the shower area. His allegations are similar to those in *Johnson* and do not approach the facts of *Henry*. Based upon *Henry* and *Johnson*, we do not disturb the trial court's dismissal of Martin's complaint.[3]

[14] As for his assertion that the trial judge was biased, the law presumes a judge is unbiased in the matters that come before the court. *Carr v. State*, 799 N.E.2d 1096, 1098 (Ind. Ct. App. 2003). To overcome the presumption, Martin must demonstrate actual personal bias. *See Bloomington Magazine, Inc. v. Kiang*, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012). Martin does not argue he made a request for recusal, does not develop cogent argument on appeal, and has failed to

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> question of whether, and to what extent, prisoners maintain a right to privacy in their bodies. As we have stated before, we do not read *Hudson* so broadly as to foreclose that right.

Henry, 969 F.3d at 777.

[3] While his complaint mentions the Indiana Constitution, Martin does not develop an argument in his appellant's brief related to the Indiana Constitution and has waived any such claims. *See Martin*, 130 N.E.3d at 136; *see also Kirchgessner v. Kirchgessner*, 103 N.E.3d 676, 682 (Ind. Ct. App. 2018) (noting an argument raised for the first time in a reply brief is waived), *trans. denied*.

establish actual bias which would warrant reversing the dismissal of his complaint. *See Carr*, 799 N.E.2d at 1098 (stating timeliness is important on recusal issues and a "party may not lie in wait to raise a recusal issue after receiving an adverse decision" and finding the appellant waived the issue) (citation omitted).

[15] For the foregoing reasons, we affirm the trial court.

[16] Affirmed.

Vaidik, J. and Pyle, J., concur.